No. 89- 278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DAVID FOSTER KENNISON,
WILLIAM ROBERT BLACK,
Petitioners

v.

BETI HOLCOMBE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF SOUTH CAROLINA

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QUESTION PRESENTED

Whether the failure of a state trial court to accord a jury trial before imposing a sentence for criminal contempt where the maximum statutory penalty and the sentence imposed are one year may be remedied by a state court of last resort vacating only the sentence and remanding only for resentencing.

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of South Carolina is not reported. The opinion is reproduced in the Appendix (hereafter "App.") at 1a. The order of the Supreme Court of South Carolina denying the Petition for Writ of Certiorari is reported at 379 S.E. 2d 899 (S.C. 1989).

JURISDICTION

On May 17, 1989, the Supreme Court of South Carolina denied a Petition for Writ of Certiorari filed by Petitioners David Kennison and Robert Black. A timely Application for Extension of Time to file a Petition for a Writ of Certiorari was granted by this Court on July 11, 1989,

extending until August 15, 1989, the time to file this Petition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Art. III, Sec. 2, Cl. 3, U.S. Constitution:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

Sixth Amendment, U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Fourteenth Amendment, U.S. Constitution:

> "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Section 20-7-1350, Code of Laws of South Carolina:

> "Any adult who wilfully violates, neglects or refuses to obey or perform any lawful order of the court, or who violates any provision of this chapter, may be proceeded against for contempt of court. Any adult found in contempt of court may be punished by a fine or by imprisonment on the public works of the county, or both fine and imprisonment, in the discretion of the court, but not to exceed imprisonment for one year or a fine of fifteen hundred dollars, or both."

STATEMENT OF THE CASE

This case arose from an action in the South Carolina Family Court concerning the custody of a minor. Petitioners David Kennison and Robert Black were each summarily convicted of criminal contempt for failing to produce the minor at the time ordered by the Family

Court and sentenced to one year in jail and fined $1,500. App. 2a. After a timely appeal was taken to the Supreme Court of South Carolina, the case was referred by that Court to the State Court of Appeals which affirmed the criminal contempt convictions but "vacat[ed] the[] sentences and remand[ed] the case to the family court for the purpose of allowing the family court to resentence the appellants." App. 5a. The South Carolina Supreme Court denied a Petition for Writ of Certiorari.

FACTS

On October 21, 1986, the Richland County Department of Social Services (hereafter "Department"), by counsel, filed a Petition For Emergency Relief in the Family Court of the Fifth Judicial Circuit of South Carolina seeking custody of Sasha Owens, a minor. The Petition was served on the child's mother, Beti Owens Holcombe, her husband (the child's stepfather), Randy Holcombe, and the Petitioners, David Kennison and Robert Black. Petitioners Kennison and Black were served because the Department believed the minor was in their custody.

At a hearing held on October 24, 1986, the Family Court found that "Kennison and Black deny knowing the present location of the minor child, although they agree to assist in facilitating her return to Richland County." Transcript of Record (hereinafter "Tr.") at 8. It also ordered them "to cooperate in attempts to find her." Tr. at 9. Three days later, Beti Holcombe filed an Answer, Counterclaim, and Cross-claim responding to the Department's Petition. Tr. at 15. In addition, she requested the Family Court to issue a Writ of Habeas Corpus, directed to Petitioners Kennison and Black as well as to three other named natural persons and a corporation. Tr. at 21. On October 29, 1986, the Family Court issued the Writ of Habeas Corpus, ordering that the minor be brought before the Family Court at 3 p.m. on November 5, 1986. Tr. at 13. The Writ was served

on Petitioners Kennison and Black in the Richland County jail where they were in custody on charges, later dismissed, that they kidnapped the minor who was the subject of the custody dispute.

As a result of the Writ of Habeas Corpus, another hearing was held before the Family Court on November 5, 1986 at which time the court was informed that the child had not been produced. At that hearing, counsel for the minor explained that he had spoken with the minor and that "she had voluntarily left the jurisdiction and that she was voluntarily staying away from the jurisdiction." Tr. at 37. The court was also informed by the minor's counsel that Petitioners Kennison and Black "know[] nothing about her location and did nothing to encourage her to leave." Tr. at 37. Counsel for the Department then explained that Petitioners Kennison and Black were incarcerated at that time, having "been charged with kidnapping . . . and bond has been set in the case." Tr. at 39. Notwithstanding their incarceration, counsel for Mrs. Holcombe asked the Family Court

> to impose a fine against Mr. Black, Mr. Kennison . . . , on a daily basis . . . until that child is produced and in the event that we do have an evidentiary hearing and one or more of these individuals can demonstrate that they actually did not have the ability to produce this child, then the Judge can lift the fine at that time, but I think we need some incentive to get this child back and I would ask since the Writ has not been obeyed by the individuals served, I would ask you to impose a continuing fee of $150 a day per individual . . . until she is produced. Tr. at 41-42.

When asked the Department's view, counsel for the Department noted that Petitioners Kennison and Black, "are now in violation" of the Family Court's order of October 24, 1986 and suggested only that the Family Court should proceed with the Writ of Habeas Corpus since "if later the State wishes to bring contempt on [the October 24, 1986] Order, . . . we'll proceed at that

point." Tr. at 45. Subsequently, after a discussion of discovery (not relevant to this Petition), counsel for Petitioners Kennison and Black informed the Family Court that they "have done everything in our power to [produce the child] and we cannot do it." Tr. at 55.

Following the above discussions with counsel, without an evidentiary hearing of any sort, the Family Court found that "the parties have failed to produce the body of the child, Sasha Owens, by the designated time, three p.m., on November the 5th. . . ." Tr. at 58-9. The Family Court, *sua sponte*, went on to state:

> As to . . Davide Foster Kennison, William Robert Black . . the Court finds that they and each of them are in contempt of court for willfully failing to obey a court order. The sentence of the Court is that each of them be punished by serving one year in prison and paying a fine of $1,500. They may purge themselves of the finding of contempt and the resulting sentences and fine by producing the child to the Family Court on or before November 10th at three p.m., that's this coming Monday. If the child is not produced to the Family Court of Richland County by three p.m., on November 10th, 1986, upon the filing of an affidavit with the Court, the parties so found in contempt will be—a Bench Warrant will be issued for their arrest at that time. Tr. at 59.

An order dated November 7, 1986, implementing its oral decision, was signed by the Family Court judge. Tr. at 61.[1] Notably, however, the orally-imposed requirement that a bench warrant be issued if the child was not produced by November 10, 1986 was not included in the order. Tr. at 66. On November 13, 1966, Petitioners Kennison and Black timely filed a Notice of Intention to Appeal with the Supreme Court of South Carolina.

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[1] While the order did not make express reference to the Court's authority to impose a penalty of one year for criminal contempt, the State Court of Appeals subsequently made clear that the authority was found in Sec. 20-7-1350, Code of Laws of South Carolina. App. 3a.

Following the filing of the Notice of Intention to Appeal, the Department, by counsel, moved the Family Court for an order dismissing it from the case. That motion was granted on December 17, 1986.[2]

In September, 1987, Petitioners Kennison and Black timely filed their opening brief in the Supreme Court of South Carolina urging, *inter alia*, that the criminal contempt convictions were invalid and should be reversed since they had not received constitutionally adequate notice of the proceeding and had not been afforded a jury trial. Counsel for Beti Holcombe filed an opposition to Petitioners Kennison's and Black's opening brief, contending, *inter alia*, that the criminal contempt convictions were valid and should be affirmed. After Petitioners Kennison and Black filed a reply to Beti Holcombe's brief, the Supreme Court, by memorandum of September 15, 1988, referred the case to the State Court of Appeals. On December 1, 1988, the Court of Appeals affirmed the criminal contempt convictions relating to Petitioners Kennison and Black (App. 2a), but, because a jury trial had not been accorded, "vacate[d] their sentences and remand[ed] the case to the family court for the purpose of allowing the family court to resentence" them to no more than six months. App. 5a.

Following a timely, but unsuccessful, Petition for Rehearing in the State Court of Appeals, Petitioners Kennison and Black filed a Petition for Writ of Certiorari in the Supreme Court of South Carolina on February 17, 1989, to which only counsel for Beti Holcombe filed an opposition on March 27, 1989. That Petition was denied on May 17, 1989 without opinion. 379 S.E.2d 899 (S.C. 1989).

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[2] Based upon the Family Court's order, the Supreme Court of South Carolina, by order dated October 7, 1987, also dismissed the Department from the appellate proceedings; the Department filed no further briefs, memoranda, or other documents in the case.

REASON FOR GRANTING THE PETITION

This Court Has Not Determined Whether A State Court Of Last Resort Must Reverse The Conviction, Or Whether It May Merely Vacate A One Year Sentence, For Criminal Contempt Imposed By A State Trial Court Pursuant To A State Statute If The Contemnor Was Not Afforded A Jury Trial.

It is well established that Art. III, Sec. 2, Cl. 3 of the U.S. Constitution, as well as the Sixth Amendment to the U.S. Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment, entitle a defendant in ordinary state criminal proceedings "to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." *Blanton* v. *City of North Las Vegas, Nevada*, 109 S.Ct. 1289, 1292 (1989). It is further well established that, when the maximum penalty imposed for criminal contempt is greater than six months, the contemnor, like any other criminal defendant, is entitled to a jury trial. *Bloom* v. *Illinois*, 391 U.S. 194 (1968). What this Court's cases have not made explicit is the remedy to be applied by a state appellate court—vacation of the sentence or reversal of the conviction—where a state criminal contemnor has been convicted without being afforded a jury trial and has been sentenced to one year in jail by a state court pursuant to a state contempt statute authorizing a maximum of one year in jail.

In the instant case, the South Carolina Court of Appeals held that the lower court "lack[ed] jurisdiction to impose [a sentence of one year] for criminal contempt absent a jury trial . . . ." App. 5a. The remedy applied by the appellate court was to "vacate the[] sentences and remand the case to the family court for the purposes of allowing the family court to resentence the appellants." App. 5a.

As authority for the remedy it created, the Court of Appeals relied upon this Court's decisions in *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974) and *Bloom*, *supra*. It also relied upon two decisions of the Supreme Court of South Carolina, *In the Interest of Darlene C.*, 301 S.E.2d 136 (1983) (case remanded for resentencing pursuant to court's inherent, not statutory, power to punish for criminal contempt; validity of conviction not at issue) and *State* v. *Petty*, 138 S.E.2d 643 (1964) (case remanded for resentencing where sentence illegal but conviction not challenged); and a decision of the North Carolina Supreme Court, *State* v. *Weaver*, 142 S.E.2d 633 (1965) (excessive sentence void as to excess). Of the three state cases, however, none support the Court of Appeals' conclusion since they do not speak to the issue of a remedy for an illegal *conviction* resulting from the failure to accord a jury trial in a state criminal contempt proceeding where the maximum statutory penalty is one year, but rather speak only to the remedy for an illegal sentence imposed following a valid conviction.

As to this Court's cases, in *Codispoti*, the narrow issue before this Court was whether a contemnor was entitled to a jury trial where the sentences for several different contemptuous acts occurring in a single trial "were to be served consecutively and, although each was not more than six months, aggregated more than six months in jail." 418 U.S. at 512-3. This Court concluded that "each contemnor was tried for what was equivalent to a serious offense and was entitled to a jury trial." 418 U.S. at 517. As a result, this Court reversed the judgment of conviction and remanded the case for further proceedings. 418 U.S. at 518. Whether it would have been a proper remedy simply to vacate the sentence of each defendant was not addressed since the state had not attempted to cure the failure to accord a jury trial by reducing the sentence as had the state in *Taylor* v. *Hayes*, 418 U.S. 488 (1974), decided the same day as *Codispoti*. See also *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).

In *Bloom*, this Court held that, "when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look at the penalty actually imposed as the best evidence of the seriousness of the offense." 391 U.S. at 211. Because he had been sentenced to 24 months imprisonment, the defendant's contempt conviction was reversed and the case remanded for further proceedings. The issue of a proper remedy where a state contempt statute provided a maximum penalty of one year was again not addressed since no such statute was involved nor had the state attempted to cure the failure to accord a jury trial by reducing the sentence.

Other cases from this Court make clear that this Court has yet to address specifically the issue raised by the instant case. For example, in *Baldwin* v. *New York*, 399 U.S. 66 (1970), this Court reversed a conviction for a Class A misdemeanor where the maximum penalty was one year but the defendant was not afforded a jury trial. Unlike *Codispoti* and *Bloom*, *Baldwin* was not a criminal contempt case, but a case involving an "ordinary criminal conviction[]." *Bloom*, 391 U.S. at 201. But, as in *Codispoti* and *Bloom*, this Court did not express an opinion on whether merely vacating the sentence would have been an appropriate remedy.

The only case in which this Court has expressed an opinion regarding a remedy in a case involving the imposition of a criminal contempt sentence exceeding six months is *Taylor*, *supra*, a companion case to *Codispoti*. In *Taylor*, this Court was faced with the question of whether a state, in the absence of a criminal contempt statute, should "be permitted, after conviction, to reduce [a] sentence [for criminal contempt exceeding six months] to less than six months and thereby obviate a jury trial." 418 U.S. at 496. This Court held:

> in the absence of legislative authorization of serious penalties for contempt, a State may choose to try any

> contempt without a jury if it determines not to impose a sentence longer than six months. We discern no material difference between this choice and permitting the State, after conviction, to reduce a sentence to six months or less rather than to retry the contempt with a jury. 418 U.S. at 496.

In the instant case, there exists a "legislative authorization of serious penalties for contempt . . . ." Thus, it would appear from *Taylor* that it would not be appropriate for a state appellate court simply "to reduce a sentence to six months or less rather than to retry the contempt with a jury." But, as *Taylor* was only addressing a situation where "legislative authorization" was absent, this conclusion is not a certainty. It is to establish clearly whether the converse of the principle established in *Taylor* regarding the power of a state appellate court to remedy a criminal contempt conviction where a statutory maximum penalty of one year exists that this Court should grant this petition.

CONCLUSION

This Court should grant a Writ of Certiorari to review the judgment of the Court of Appeals of South Carolina.

Respectfully submitted,

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August, 1989

APPENDIX

APPENDIX

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

EX PARTE: BETI OWENS HOLCOMBE,
Respondent,

v.

DAVID FOSTER KENNISON, WILLIAM ROBERT BLACK, LINDA L. BLACK, OTIS HEWITT, JOHN DOE, MARY ROE, NEW BANNER INSTITUTE, and THE RICHLAND COUNTY DEPARTMENT OF SOCIAL SERVICES, of whom DAVID FOSTER KENNISON, WILLIAM ROBERT BLACK and LINDA BLACK and OTIS HEWITT are
Appellants,

IN RE: RICHLAND COUNTY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

BETI OWENS HOLCOMBE, RANDY HOLCOMBE, DAVID KENNISON and ROBERT BLACK,
Respondents.

In the interest of: SASHA OWENS, Now MARSH, a minor under the age of eighteen years, by her Guardian ad Litem, LEE CAGGIOLA.

Appeal from Richland County
H. Dean Hall, Family Court Judge

Memorandum Opinion No. 88-MO-125
Heard November 9, 1988 Filed December 1, 1988

AFFIRMED IN PART
REVERSED IN PART
VACATED IN PART
AND REMANDED

Jack F. McGuinn and Herbert E. Buhl, III, both of Columbia, for appellants.

John D. Elliott, of Columbia, for respondent.

Attorney for Guardian ad Litem: Francenia B. Heizer, of Columbia.

PER CURIAM: This appeal by David Foster Kennison, William Robert Black, Linda L. Black, and Otis Hewitt attacks the order of the family court finding each of them in contempt of court for disobeying a writ of habeas corpus and summarily sentencing each of them to a one-year term of imprisonment and to a fine of $1,500 for disobedience of the writ after they failed as directed in the writ to produce on November 5, 1986, the person of Sasha Owens, a minor child and the daughter of Beti Owens Holcombe. The order, however, allowed each appellant to avoid imposition of the sentence by producing the child by no later than 3:00 p.m., November 10, 1986. We affirm in part, reverse in part, vacate in part, and remand.

1. We affirm the finding of contempt as to Kennison, William Black, and Linda Black and reverse the finding of contempt as to Hewitt.

Although the order finding each of the appellants in contempt and sentencing each of them to a term of imprisonment and a payment of a fine allowed each appel-

lant to avoid the imprisonment and the fine by producing the child by a specified time, the contempt here nonetheless constituted criminal contempt and not civil contempt because, as we read its order, the family court imposed the sentences primarily to uphold its authority and to punish the appellants for their disobedience to its writ of habeas corpus, a power well within its authority, and because the sentences lost their conditional character when the appellants failed to produce the child by the appointed time and thereby lost, so to speak, "the keys of prison [carried] in their own pockets." *Curlee v. Howle*, 277 S.C. 377, 384, 287 S.E.2d 915, 919 (1982); *Checker Yellow Cab Co. v. Checker Cab and Parcel Service*, 287 S.C. 608, 340 S.E.2d 549 (Ct. App. 1986); *see Shillitani v. United States*, 384 U.S. 364, 370, 86 S. Ct. 1531, 1535, 16 L. Ed. 2d 622, 627, n.5 (1966) ("[A] criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punshment or deterrence."); CODE OF LAWS OF SOUTH CAROLINA § 20-7-1350 (1976) (Cum. Supp. 1987) (statute authorizing contempt proceedings against an adult who wilfully violates or refuses to obey any lawful order of the family court).

Evidence sufficient to support the family court's finding that Kennison, William Black, and Linda Black committed criminal contempt by wilfully disobeying its writ of habeas corpus can readily be found in the record. *See Checker Yellow Cab Co. v. Checker Cab and Parcel Service, supra* (wherein the court held that a conviction for criminal contempt will be affirmed where there is any evidence of a wilful disobedience of a court order).

According to the affidavit of Jeff Fuller, an investigator with the Richland County Sheriff's Department, Linda Black, who is Kennison's wife, then had the child with her and had made plans with Kennison for concealing the child. An affidavit of Holcombe states that Linda Black and Hewitt then had physical custody of the child. The appellants nowhere controverted these assertions.

Indeed, a letter authored by Jack McGuinn, at that time counsel for Kennison, William Black, and Linda Black, and submitted by McGuinn to the court affirms that Linda Black in telephone conversations with McGuinn just prior to the hearing asked McGuinn to convey to Kennison and William Black, who were confined in the Richland County Jail awaiting trial on kidnapping charges but attended the habeas corpus hearing, a request that they advise her regarding whether to bring the child with her to the habeas corpus hearing and that McGuinn told her that Kennison and William Black "are now opposed to them returning [to Columbia]."

As the record reflects, neither Linda Black nor the child attended the hearing. The refusal of Linda Black to obey the writ without Kennison's and William Black's advising her to do so and the expression of Kennison and William Black through their attorney that they opposed Linda Black's and the child's returning to Columbia evidences such wilful noncompliance with the writ as to warrant the finding of contempt that the family court made regarding Kennison, William Black, and Linda Black. *See* 39 Am. Jur. 2d *Habeas Corpus* § 176 at 305 (1968) ("It is the duty of all persons to . . . obey a writ of habeas corpus and every person who unlawfully disobeys its commands or unlawfully resists or counsels resistance to its execution is in contempt of court and may be summarily punished therefor."); 39A C.J.S. *Habeas Corpus* § 187 at 89-90 (1976) (disobedience of a writ of habeas corpus, such as by neglecting to produce the person sought, by failing to make a reasonable effort to prevent noncompliance with the writ, or other acts of interference with the writ constitutes a contempt of court).

Beyond Holcombe's mere assertion in her affidavit, which she made "on information and belief," that Hewitt also then had physical custody of the child, there is no evidence to support the family court's finding that Hewitt

wilfully disobeyed the writ of habeas corpus and committed contempt of court.

2. Because Kennison, William Black, and Linda Black, upon their convictions for criminal contempt, were each sentenced to a term of imprisonment greater than six months, a sentence the family court lacks jurisdiction to impose for criminal contempt absent a jury trial, which the appellants were never afforded and consequently did not waive, we vacate their sentences and remand the case to the family court for the purpose of allowing the family court to resentence the appellants. *See Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974) (defendants convicted of criminal contempt in state criminal trials and sentenced to imprisonment for more than six months are entitled to jury trials); *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968) (the Sixth Amendment guaranty of a jury trial, which is made binding on the States by virtue of the Fourteenth Amendment, applies to serious criminal contempts); *State v. Buchanan*, 279 S.C. 194, 304 S.E.2d 819 (1983) (a defendant is not entitled to a jury trial where the sentence for contempt is for one six-month term of imprisonment); *cf. State v. Arthur*, Opinion No. 22924 (S.C., filed November 14, 1988) (case addressing issue of waiver of an accused's right to a jury trial in a criminal proceeding); *In the Interest of Darlene C.*, 278 S.C. 664, 301 S.E.2d 136 (1983) (wherein the Supreme Court upheld the appellant's conviction for contempt and remanded the case for resentencing of the appellant as a contemnor and not as a delinquent and limited any commitment of the appellant to no more than six months); *State v. Petty*, 245 S.C. 40, 138 S.E.2d 643 (1964) (the well-settled practice in South Carolina in a case involving an illegal sentence is to affirm the conviction but set aside the sentence and remand the case to the trial court for the purpose of resentencing the defendant); *State v. Weaver*, 264 N.C. 681, 142 S.E.2d 633 (1965) (holding, among other

things, that a judgment imposing a sentence in excess of the legal limit is void as to the excess).

3. Although some of the appellants' exceptions are all but incomprehensible and many do not comply with Rule 4, Section 6 of the Supreme Court Rules because they either do not contain a concise statement of one proposition of law or fact or do not contain a complete assignment of error, we have nevertheless considered the appellants' remaining arguments and hold that these arguments have no merit and do not warrant further consideration. CODE OF LAWS OF SOUTH CAROLINA § 14-8-250 (1976) (Cum. Supp. 1987) (the Court of Appeals need not address a point that is manifestly without merit); *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 364 S.E.2d 202 (Ct. App. 1988) (case wherein the Court of Appeals did not address issues deemed to have no merit). In fact, most of their exceptions present questions that, for these appellants, are issues raised for the first time on appeal.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

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Respondent.

**On Petition For Writ Of Certiorari To
The Court Of Appeals
For The State Of South Carolina**

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of South Carolina

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In this child custody case, the mother of a fourteen-year-old child brought an action for a writ of habeas corpus in the Family Court in Columbia, South Carolina, alleging her abduction by the Petitioners.

The Petitioners had earlier agreed to cooperate with the Family Court in an action which had been initiated by the Richland County Department of Social Services and

were placed under an order to do so. Transcript of Record (hereinafter "Tr.") at 9. Thereafter, the mother brought an action of her own seeking, *inter alia*, a writ of habeas corpus, directed to the Petitioners to return her child. Tr. at 21. The Family Court issued the Writ of Habeas Corpus requiring the child's return by the Petitioners and their confederates at 3:00 o'clock p.m., November 5, 1986. Tr. at 13.

The Family Court convened a hearing at the appointed date and time. The Petitioners were represented by counsel and appeared with their counsel at those proceedings.

At those proceedings, their counsel handed up correspondence addressed to the Court, and signed by their counsel, which read as follows:

> During last night I received a telephone call from my client, Mrs. Black, the wife of David Kennison and the de facto mother of Sasha.
>
> She called me again this morning at my office, wanting me to convey to David and Bob Black a signal (at the call back) as to whether or not she should bring Sasha to Columbia for the hearings scheduled for today at 3:00 P.M. I advised Mrs. Black that Sasha was represented by Jack Swerling who is the best criminal lawyer I know and she should follow his advice regardless and her husband wanted her and the child back in the jurisdiction due to promises we had made with the Court which should be kept at all costs and furthermore that advised Mr. Black and Mr. Kennison to bring them back if possible for their own good because once safely returned to the jurisdiction we might expect a reconsideration of the bond denial, however, Black and David are now opposed to them returning because he

> (sic) is being forced daily to shave with the same blades (with cold water) the other prisoners are using and one of them has AIDS. This exchange of nicks and blood has caused them great anguish and concern . . . Tr. at 60A.

As the record demonstrates, the Family Court held the Petitioners in contempt for their failure to produce the child and sentenced them to one year in jail and fining each of them $1,500.00. However, the Family Court also allowed the Petitioners to purge themselves of contempt by giving them five additional days to return the child. Tr. at 61.

From the Order, the Petitioners appealed on various grounds to the Supreme Court of South Carolina. They raised for the first time their claim to a right to a jury trial in one sentence in their 89-page brief in September, 1987, almost a year after the hearing (Appellants' brief at 78). The South Carolina Court of Appeals entertained the Petitioners' claims after the Supreme Court transferred jurisdiction to the Court of Appeals. On December 1, 1988, the Court of Appeals affirmed the criminal contempt convictions in a Memorandum Order contained in the Petitioners' Appendix. After the Petitioners unsuccessfully sought a writ of certiorari in the State Supreme Court, they now petition for certiorari here.

REASONS FOR DENYING THE WRIT

The Petition for Writ does not present a substantial federal question under the circumstances of this case.

The Petitioners have correctly cited *Bloom v. Illinois*, 391 U.S. 194 (1968), for the proposition that when the

maximum penalty imposed for criminal contempt is greater than six months, the contemnor is entitled to a jury trial. This was likewise the rationale for the vacation of the sentences by the South Carolina Court of Appeals.

However, whether the contemnors were cited under the statutory authority provided the Family Court for the imposition of the one-year sentence at issue here is subject to doubt. While the Court of Appeals adverted to the statutory authority allowing Family Courts in South Carolina to impose the sanctions of contempt, at App. 3a, this may not be the basis relied upon by the Court of Appeals in characterizing the nature of the contempt and its concomitant sentence as criminal.

To begin with, the South Carolina Court of Appeals, in upholding the authority of the Family Court to punish the Petitioners for their disobedience of the Family Court's writ cited *Curlee v. Howle*, 277 S.C. 377, 280 S.E.2d 915 (1982) in support of the Family Court's imposition of sanctions. In that case, which also involved child abduction by a parent, the South Carolina Supreme Court established that the Family Courts, like all courts, possessed the inherent power to punish contemnors.

> [That power] is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and *writs*, (emphasis added) of the courts and consequently to the due administration of justice.

Id., 287 S.E.2d 915, 917. While not critical to this Court's decision, there may be some question under South Carolina law as to whether the statutory authorization of a

one-year sentence and a $1,500.00 fine is a limitation on the civil contempt powers of the Family Court.

Moreover, in another case involving the correction of a contempt sentence by a Family Court, the State Supreme Court has upheld a contempt conviction under the same rationale while correcting a misapplied statutory sentence for a juvenile. *In The Interest of Darlene C.*, 278 S.C. 664, 301 S.E.2d 136 (1983) addressed the imposition of an indeterminate sentence imposed on a juvenile for contempt. The State Supreme Court upheld the conviction of a juvenile for criminal contempt adverting to the inherent power of the Family Court to punish contemnors. In so holding, the State Supreme Court nevertheless corrected the original sentence, which was an indeterminate sentence imposed by the Family Court pursuant to statutory provisions of the South Carolina Children's Code regarding the sentencing of juveniles, by remand to the trial court for the imposition of a sentence not to exceed six months.

Even if the original sentence here had been imposed by the Family Court pursuant to its statutory authority, and not its inherent authority, the remedy fashioned by the Court of Appeals ought to be sufficient under the facts of this case.

To begin with, as *Bloom v. Illinois* points out, the rationale for the guarantee of a right to a jury trial in criminal contempt cases where the punishment may exceed a term of six months is to avoid the arbitrary exercise of official power. *Bloom*, 391 U.S. at 202. The record clearly established to the satisfaction of the South

Carolina Court of Appeals that the Petitioners' noncompliance with the previous orders of the Family Court was willful. The Petitioners made no effort at the hearing before the Family Court, November 5, 1986, to mitigate their lack of cooperation to any degree. It is therefore unlikely that their conviction was the result of an arbitrary or capricious act by the state trial court.

In the face of the maximum statutory sanction of one year, the Petitioners challenge the remedy which was fashioned by the Court of Appeals limiting any sentence to be imposed to one six months or less.

There is ample state decisional law upholding such a result. While the Petitioners contend that the case cited by the Court of Appeals as directing the appropriate remedy, *State v. Petty*, 245 S.C. 40, 138 S.E.2d 633 (1965), involved an appellate challenge to an illegal sentence but not the fact of the appellant's conviction, *State v. Petty* itself cited another South Carolina case, *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), for the "well settled practice" in South Carolina to affirm the conviction and set aside the sentence. In *State v. Gregory*, the criminal defendant there appealed both the fact his conviction as well as the sentence, the latter which was held to be excessive.

Taylor v. Hayes, 418 U.S. 488 (1974), does indeed leave open the question whether a state may set aside an invalid sentence for contempt in the face of a criminal contempt statute allowing a longer sentence.

If the Petitioners complain that a state should be prohibited altogether from obviating the right to a jury trial by a curative sentence, the are mistaken.

> It is argued that a state may not be permitted, after conviction, to reduce the sentence to less than six months and thereby obviate a jury trial The thrust of our decisions, however, is to the contrary: In the absence of legislative authorization of serious penalties for contempt, a state may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months. We discern no material difference between this choice and permitting the state, after conviction, to reduce the sentence to six months or less rather than to re-try the contempt with a jury.

Taylor, 418 U.S. at 496. *Taylor* then cites *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), as authority for such a curative sentence in the federal system.

In *Cheff*, the defendant was convicted of criminal contempt by the Seventh Circuit Court of Appeals for his contempt of that Court's *pendente lite* order requiring compliance with an order of the Federal Trade Commission. In its supervisory capacity, this Court advised the federal courts that sentences in contempt cases in excess of six months in the federal system for criminal contempt could not be imposed by a court absent a jury trial or waiver thereof.

> Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries.

Id., 384 U.S. 380.

It is conceded that if indeed the Petitioners were sentenced under the state's statutory authorization for the imposition of a maximum sentence of one year by the Family Court, and not under its inherent powers, *Taylor*

leaves open the question of the remediation of the sentence or outright reversal as an appropriate remedy. However, the command of the South Carolina Court of Appeals on remand is clear and unequivocal: The Petitioners are not to receive a sentence in excess of six months from the Family Court. There is therefore no possibility they will face a term in excess of sanctions reserved for petty offenses under the previous decisions of this Court. *Cf., Codispoti v. Pennsylvania,* 418 U.S. 506, 512 (1974). Given the clear record of the Petitioners' contumacious conduct before the trial court, and the decided policy of the State of South Carolina to remediate excessive sentences by remand, a policy which is due some deference, the South Carolina Court of Appeals has fashioned a remedy which is wholly adequate to serve the Petitioners.

CONCLUSION

Under the facts of this case, any federal question presented by the Petitioners is insubstantial at best, and the Petition for Writ of Certiorari should therefore be dismissed.

This the 21st of November, 1989.

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No. 89-278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DAVID FOSTER KENNISON
WILLIAM ROBERT BLACK,
Petitioners,

v.

BETI HOLCOMBE,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of South Carolina

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

REASON FOR GRANTING THE PETITION

The Petition Presents A Substantial Federal Question

It is "conceded" by Respondent, as asserted by Petitioners, that, "if indeed the Petitioners were sentenced under the state's statutory authorization for the imposition of a maximum sentence of one year by the Family Court, and not under its inherent powers, *Taylor* [v.

Hayes, 418 U.S. 488 (1974)[1]] leaves open the question of the remediation of the sentence or outright reversal as an appropriate remedy." Respondent's Opposition To The Petition For a Writ of Certiorari (hereinafter, "Opposition"), at 7-8. This concession reiterates Respondent's earlier statement that *Taylor* "does indeed leave open the question whether a state may set aside an invalid sentence for contempt in the face of a criminal contempt statute allowing a longer sentence." Opposition, at 6.

The sole genuine contention advanced by Respondent in opposing the Petition is that it "is subject to doubt" whether Petitioners "were cited under the statutory authority provided the Family Court for the imposition of the one-year sentence at issue here. . . ." Opposition, at 4.[2]

To support her contention, Respondent points only to the Court of Appeals' citation to, and quotation from, *Curlee* v. *Howle*, 277 S.C. 377, 287 S.E.2d 915 (1982). In fact, the Court of Appeals' citation to *Curlee* does not raise any doubt since the Court of Appeals was only using language from *Curlee* (277 S.C. at 384, 287 S.E. 2d

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[1] "[*I*]*n the absence of legislative authorization* of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months." 418 U.S. at 496 (emphasis added).

[2] Respondent also argues that the Court of Appeals acted properly in vacating only the Petitioners' sentences, but not their convictions, based upon what she terms "the 'well settled practice' in South Carolina to affirm the conviction and set aside the sentence," Opposition, at 6, and upon her reading of *Bloom* v. *Illinois*, 391 U.S. 194 (1968). Opposition, at 5-6. While Petitioners dispute Respondent's reading of *State* v. *Gregory*, 198 S.C. 98, 16 S.E. 2d 532 (1941) (case remanded for resentencing where sentence was abuse of discretion) and her understanding of the rational of *Bloom*, Petitioners will not respond to Respondent's arguments at this time since the proper place for such a discussion is in briefs on the merits should this Court grant this petition.

at 919) to support its (correct) conclusion that, unlike in *Curlee* (where, after a discussion of the distinction between criminal and civil contempt, the contempt was determined by the court to be civil), Petitioners' contempt "constituted criminal contempt and not civil contempt. . . ." Appendix to Petition (hereinafter, "App.") 3a. That discussion of the distinction between criminal and civil contempt was the only purpose of its reference to *Curlee* is confirmed by the fact that the Court of Appeals also referred to *Checker Yellow Cab Co.* v. *Checker Cab and Parcel Service*, 287 S.C. 608, 340 S.E.2d 549 (Ct. App. 1986) and to *Shillitani* v. *United States*, 384 U.S. 364 (1966) immediately following its citation to *Curlee* and *Shillitani*, and both *Checker Yellow Cab Co.* and *Shillitani* dealt with the distinction between criminal and civil contempt.[3]

It is thus evident, when taken in conjunction with the Court of Appeals' citation of Section 20-7-1350, Code of the Laws of South Carolina, and the fact that the Court of Appeals at no time even mentioned "inherent powers," that the Court of Appeals (like the Family Court, which had sentenced Petitioners to precisely the maximum sentence allowed by Section 20-7-1350) viewed Section 20-7-1350 as the authority for the Family Court's sentence.

CONCLUSION

Because it is plain that Petitioners were sentenced pursuant to a state statute which allowed the imposition of a sentence of one year, but were not accorded a jury trial, and Respondent concedes that this Court has not established whether a jury trial must be accorded in such circumstances, this Court should grant this petition to

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[3] Notably, the page in *Curlee* cited by the Court of Appeals is the *Curlee* court's discussion of *Shillitani*.

resolve this important and substantial question of federal constitutional law.

Respectfully submitted,

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December 1989